Supreme Court, U.S.
FILED
FEB 17 1994
OFFICE OF THE CLERK

No. 93-1133

In the
Supreme Court of the United States

October Term, 1994

TOWN OF GRAY, and
REGIONAL WASTE SYSTEMS, INC.,
Petitioners,

v.

TRI-STATE RUBBISH, INC., and
RECYCLABLES UNLIMITED SERVICES, INC.,
Respondents.

Petition For A Writ Of *Certiorari*
To The Maine Supreme Judicial Court

BRIEF FOR THE STATE OF MAINE AS *AMICUS CURIAE* SUPPORTING PETITIONER

MICHAEL E. CARPENTER
Attorney General

LUCINDA E. WHITE
Assistant Attorney General
(Counsel of Record)
Department of Attorney General
State House Station 6
Augusta, Maine 04333
(207) 626-8800

CABANNE HOWARD
Assistant Attorney General
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

ARGUMENT 5

THE CONSTITUTIONALITY OF LOCAL POLICE POWER ORDINANCES THAT DIRECT TOWN GENERATED MUNICIPAL SOLID WASTE TO DESIGNATED WASTE-TO-ENERGY FACILITIES IS AN ISSUE OF TREMENDOUS PRACTICAL IMPORTANCE TO THE STATE OF MAINE

A. Responsible Management Of Local Waste, Including Closure Of Substandard Landfills And Regionalization Of Disposal, Has Been A Long-Term State Interest 6

B. *C & A Carbone v. Town Of Clarkstown* May Not Resolve The Issue Presented Here And Thus May Create Uncertainty For Future Municipal And State Management Of Municipal Solid Waste 21

CONCLUSION 24

TABLE OF AUTHORITIES

Cases **Page**

Carbone v. Town of Clarkstown, No. 92-1402 (U.S. Sup.Ct. argued Dec. 7, 1983) 5,6,21

Chemical Waste Management, Inc. v. Alabama, 504 U.S. __, 112 S.Ct. 2009 (1992) 23

City of Auburn and Mid-Maine Waste Action Corporation v. Tri-State Rubbish, Inc., 630 A.2d 227 (Me.1993) 4

Dennis v. Higgins,498 U.S. 439 (1991) 22

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources 504 U.S. ___, 112 S.Ct. 2019 (1992) 23

Philadelphia v. New Jersey, 437 U.S.617 (1978) 23

Constitutional Provisions

U.S. Const. Art. I, § 8, cl.3 1,4,5,21,22

Statutes **Page**

38 M.R.S.A. §§ 1301-1308 8

38 M.R.S.A. § 1302(1973) 8

38 M.R.S.A. § 1304-B
(1989 & Supp. 1993) 17

38 M.R.S.A. §§ 1310-C to 1310-H
(1983 & Supp. 1993) 19

38 M.R.S.A. § 1311 (repealed 1983), 10,11

38 M.R.S.A. § 1311-1315
(repealed 1983), ... 10

38 M.R.S.A. § 2101, et seq.
(Supp. 1993) 3

38 M.R.S.A. § 2103(2)(J) (Supp. 1993) . 3

38 M.R.S.A. § 2103(1)(K) (Supp. 1993) 20

42 U.S.C.A. §§ 1983 and 1988
(1981 and Supp. 1993) 20

P.L. 1983, c. 387 8

P.L. 1983, c. 566 § 43 10

Rules

U.S. Sup.Ct. R. 37.5 1

Legislative Documents **Page**

L.D. 949 (110th Legis. 1981) 14

L.D. 1392 (111th legis. 1983) 17-18,19

L.D. 1641 (110th Legis. 1981) 14,15,16

Sen. Amend. B. to L.D. 1641, No. S-371 (110th Legis. 1981) . . . 14

Miscellaneous

DEP Report, *A Review of Maine's Municipal Solid Waste Management Program* (March 1981) . . . 7,9,11,12,13

Report of the Energy and Natural Resources Committee on Study of Solid Waste Management and Disposal Policy in Maine (June 18, 1987) 16

STATEMENT OF INTEREST

The State of Maine (the "State") submits this brief by its Attorney General as *amicus curiae*, pursuant to Supreme Court Rule 37.5, in support of the pending petition for a writ of *certiorari*. In the State's view, the decision of the Supreme Judicial Court of Maine incorrectly concluded that a local police power ordinance regulating solely its own local municipal solid waste has a "discriminatory effect" on interstate commerce, thereby arguably subjecting the ordinance to strict scrutiny at trial under the Commerce Clause.

The State files this brief because it has a vital interest in the responsible management of municipal solid waste generated within its borders, where local ordinances of the kind at issue here play a major role. Maine municipalities have historically been both required by the

State to dispose of locally generated waste and permitted to direct such waste to a particular waste disposal facility. In recent years, however, the State has required literally hundreds of local, substandard landfills to be closed, and has provided financial support to municipalities leading to the development of environmentally superior regional waste disposal solutions, such as the waste-to-energy (incineration) facility owned by Petitioner Regional Waste Systems, Inc. ("RWS"). Historically both the executive and legislative branch of State government have assumed responsibilities in this State and local partnership.

Reinforcing this new approach, in 1989 the Legislature created a new agency, the Maine Waste Management Agency, to plan for and implement an integrated approach to solid waste management.

38 M.R.S.A. §§ 2101, *et seq.* (Supp. 1993). That Agency is specifically charged to work with municipalities and regional associations to manage the State's solid waste. 38 M.R.S.A. § 2103(2)(J) (Supp. 1993). If the error in the decision below is not corrected, and the ordinance is ultimately determined to be unconstitutional, the State's policy of encouraging regional waste management solutions will be frustrated. Consequently, Petitioner Town of Gray and many other municipalities will undoubtedly turn to the State for financial and/or other support in the wake of the instability created, or may alternatively abandon all efforts to responsibly manage waste disposal practices within their jurisdiction. Either way the State will be directly and adversely impacted. Accordingly, the State has a strong

interest in presenting its views on the constitutionality of the Town of Gray Ordinance.[1]

---

[1] The State presented its position in an *amicus* brief in a similar case before the Supreme Judicial Court of Maine, *City of Auburn and Mid-Maine Waste Action Corporation v. Tri-State Rubbish, Inc.*, 630 A.2d 227 (Me. 1993). In that brief (as here) the State took the position that the [Auburn] solid waste flow control ordinance was authorized by State law, did not discriminate against interstate commerce, and thus Auburn needed only to show that any incidental burden on interstate commerce resulting from the Ordinance was not clearly excessive in relation to local benefits, in order to survive Commerce Clause scrutiny. In spite of Tri-State's focus on both waste and recyclables in its arguments, the holding of the Supreme Judicial Court in the *City of Auburn* case (with respect to the Commerce Clause) was limited to the Ordinance's impact on recyclable materials. 630 A.2d at 234. The Court's decision did not reach the waste issue, and remanded the case to permit Tri-State "to demonstrate more specifically the recycling markets effected." *Id.* at note 19. The *City of Auburn* case is still pending in Superior Court.

Since the State had already presented its position in the *City of Auburn* case, it did not file an *amicus* brief in this later case.

ARGUMENT

THE CONSTITUTIONALITY OF LOCAL POLICE POWER ORDINANCES THAT DIRECT TOWN GENERATED MUNICIPAL SOLID WASTE TO DESIGNATED WASTE-TO-ENERGY FACILITIES IS AN ISSUE OF TREMENDOUS PRACTICAL IMPORTANCE TO THE STATE OF MAINE

The State of Maine is aware that there is now pending before this Court a case in which a local police power ordinance directing local waste (that originated out-of-state) to a local transfer station has been challenged as violative of the Commerce Clause of the U.S. Constitution. In *C & A Carbone v. Town of Clarkstown*, No. 92-1402 (U.S. Sup.Ct. argued Dec. 7, 1983), multiple briefs in support of *Clarkstown* have ably presented the principal Commerce Clause arguments. Indeed Maine itself joined the *amicus* brief submitted by the State of Ohio in that case. The *certiorari* petition here

both sets out a new argument concerning principles of federalism and democratic self-governance (Pet. 15-18) and distinguishes the facts here from those in *Clarkstown* (Pet. 27). The State does not intend to repeat those arguments. The State's purpose in filing this *amicus* brief is to explain to the Court the importance of the issue (a different issue from that posed in *Clarkstown)* to the State of Maine.

A. Responsible Management of Local Waste, Including Closure Of Substandard Landfills And Regionalization Of Disposal, Has Been A Long-Term State Interest.

For more than a decade the State has actively participated in helping its municipalities (and other units of local government) responsibly manage waste generated within the State. A summary of the development of the governing statutes

is set out in the *certiorari* petition. (Pet. 7-10).

The early history of State involvement in local waste management is contained in a March, 1981 report of the Maine Department of Environmental Protection (DEP), entitled *A Review of Maine's Municipal Solid Waste Management Program.* (DEP Report).[2] To summarize the report, since the mid-1960's, the disposal of solid waste was generally recognized in Maine (as well as nationally) as an important environmental issue. In 1968 the Health Engineering Division of the Maine Department of Health and Welfare was assigned responsibility for investigating solid waste management in Maine. The Division issued a report in 1970 detailing

---

[2] This report is found in the Maine Law and Legislative Reference Library, State House Station 43, Augusta, ME 04333, cat. no. TD 788.4.M2 M347 1980.

the severity of the problem and suggesting possible approaches to remedying the situation. In 1973 the Legislature adopted the Solid Waste Management Act, P.L. 1983, c. 387, enacting 38 M.R.S.A. §§ 1301-1308. Pursuant to this Act, the Board of Environmental Protection adopted regulations that ultimately became effective on February 1, 1976.

The Act identified as the State's highest priority policy objective "economic, efficient and environmentally sound method[s] of waste disposal." 38 M.R.S.A. § 1302 (1973). Other policy objectives identified included the reduction of the volume of solid waste, and the reuse and recovery of resources being wasted. *Id.*

The DEP program addressed some of these policies through the following specific goals:

1. Reduction in the total number of sites;
2. Reduction of the volume of solid waste subject to land disposal; and
3. Regionalization of the disposal of solid waste.

DEP Report, pp. 1 and 8. The DEP Report documents that from 1977 to 1980 these goals were being pursued by the State and by municipalities. The number of solid waste disposal facilities decreased from 454 to 334. More than half of Maine municipalities were involved with one or more other communities in dealing with solid waste disposal. Maine communities were increasingly pursuing waste volume reduction through baling, shredding, incineration, recycling and composting.

In 1979 the Legislature established a new Solid Waste Management Subsidy Program and appropriated $500,000 to be divided among eligible communities to pay for up to 50% of their costs of maintaining and operating solid waste disposal facilities (that were in substantial compliance with State laws and regulations). 38 M.R.S.A. §§ 1311-1315 (repealed 1983).[3] In creating this program the Legislature specifically found:

> that proper disposal of solid wastes, and protection of land, air and water resources is important to the public health, safety and welfare; that the Legislature has mandated that municipalities provide for the proper disposal of solid wastes; that waste disposal facilities

---

3 A copy of this statute is provided as Appendix A. The entire statute was repealed in 1983 by P.L. 1983, c. 566 § 43. In its place the Legislature enacted a $1,500,000 bond issue focused on compensating municipalities for capital costs associated with new resource recovery facilities, rather than with operating costs at existing landfills. See text, *infra*.

> must comply with strict state and federal requirements; and that the operating costs of these facilities are high, putting an increasing burden on local property taxes.

38 M.R.S.A. § 1311. The DEP Report noted that this subsidy program had two purposes: (1) to help defray costs, and (2) to provide an incentive to communities to dispose of wastes in compliance with State laws and regulations. DEP Report, p. 4. During the spring and summer of 1980, the State's program reimbursed 119 municipalities (and one recycling center) between 12 and 13 percent of eligible reported costs. *Id.* However, the DEP identified several shortcomings to the program:

1. The lower than expected rate of return to communities;

2. The probability that as more municipalities qualified, the subsidy rate would decrease; and
3. The greater than expected administrative burden on the DEP.

DEP Report, p. 5. In addition, and of more importance, the DEP perceived that this program could not be instrumental in reducing the total number of disposal sites, a goal of Maine's solid waste management program. *Id.* Shifts to alternative (superior) methods of disposal needed capital which was not available through the subsidy program. *Id.*

In 1980, DEP inspections revealed that while operation of facilities was improving, many facilities were not located in environmentally acceptable sites. DEP Report, p. 8. A four year DEP study completed in 1980 had conclusively shown that a disposal facility located on

an environmentally unacceptable site will cause adverse environmental impacts even if operated properly. DEP Report, p. 25.[4] The DEP concluded that "[t]he biggest challenge facing Maine in relation to the management of solid waste disposal is the closing and relocation of facilities which are not properly located" and noted that "the opportunity to make major improvements in this situation will present itself over the next five years as nearly two-thirds of the State's disposal [facilities] reach capacity." DEP Report, p. 8.

Against this background the State next channeled money for waste management to

---

[4] The study examined the impact of Maine's solid waste disposal sites on ground water, surface water, and vegetation. Data was collected at 13 sites chosen as being representative of disposal areas located in the major surficial geologic settings in the State. DEP Report, p. 25.

municipalities through a general fund bond issue. In 1981 a bond issue in the amount of $1,500,000, was authorized by the Legislature to "provide for the evaluation and implementation of municipal or quasi-municipal solid waste resource recovery or resource conservation."[5] The preamble to the bill enacting the bond issue declared that the Legislature deemed the bonds "necessary to alleviate the threat to ground and surface waters to prevent environmental damage, to conserve valuable land and other resources and to reduce the hazard to the health, safety and welfare of the State caused by prevailing solid

---

[5] The original bill proposed up to $5,000,000. Legislative Document 949 (110th Legis. 1981). A new draft of the bill revised that amount to up to $2,500,000. Legislative Document 1641 (110th Legis. 1981)(App. B to this brief). The final amount approved and ratified through a statewide referendum was $1,500,000. Sen. Amend. B to Legislative Document 1641, No. S-371 (110th Legis. 1981).

waste management practices." *Id.* (App. B) The Statement of Fact accompanying the bill further elucidated the Legislature's intent and concerns:

> The bond issue is intended to assist communities with the costs of evaluating, designing and implementing solid waste management programs which provide for resource conservation and recovery systems.
>
> Solid waste systems that protect the public health, safety or welfare and prevent or abate air and water pollution benefit the people of Maine as a whole, as well as the people of the immediate local area. Resource recovery and conservation could provide solid waste management solutions for 60% of Maine's municipal waste and reduce petroleum needs by 600,000 barrels each year. Many resource recovery projects fail to reach construction even though they are proven to be financially and environmentally advantageous. It is often impossible for communities to receive the expert management, financial and technical guidance essential for the implementation of the facility. The statewide sharing of the benefits of

> recovery and conservation programs makes it desirable that these programs be helped in obtaining the necessary professional assistance. The bond issue and its accompanying program authorization proposes that some of the development costs be shared on a statewide basis.

Legislative Document 1641, Statement of Fact (110th Legis.).

From 1982 to 1985, $1,000,000 derived from the bond issue was distributed to 13 different regions of the State. *Report of the Energy and Natural Resources Committee on Study of Solid Waste Management and Disposal Policy in Maine 25 (June 18, 1987).*[6] One recipient was the Greater Portland Council of Governments which together with Petitioner RWS prepared a feasibility study of solid waste disposal

---

[6] This report is found in the Maine Law and Legislative Reference Library, State House Station 43, Augusta, ME 04333, cat. no. TD 788.4.M2 M3561 1987.

alternatives, including waste-to-energy systems. See Pet. 8, n. 5.

Some of the feasibility studies, including the one done by the Greater Portland Council of Governments, conducted with this State financial assistance identified a new problem: the need for explicit municipal authority to guarantee delivery of solid waste to a specific facility. The Legislature quickly responded by enacting 38 M.R.S.A. § 1304-B, the enabling statute under which the Gray Ordinance at issue in this case was adopted. The Statement of Fact accompanying this legislation reaffirmed the State's commitment to fully support municipalities in creating regional solutions to the State's waste disposal problems. Legislative Document 1392, Statement of Fact (111th Legis.

1983) (App. C to this brief). In that Statement it was recognized that:

1. Groups of municipalities were actively working to develop energy recovery facilities;
2. During the next five years, 120 to 150 municipalities would have to close solid waste disposal sites that had reached capacity or were causing environmental damage;
3. Energy recovery facilities have high capital costs and long payback periods;
4. Most energy recovery facilities required participating municipalities to deliver a minimum amount of waste or pay a penalty;
5. In order to meet such contractual obligations municipalities needed to pass "flow control ordinances"; and

6. Federal Court decisions indicated that a state Legislature must "clearly articulate and affirmatively express" a policy to promote energy recovery and authorize municipalities to control their solid waste.

Id. Thus, although the State has not been a financial partner in developing energy recovery facilities, it has used incentives (and penalties for substandard facilities) to encourage regional waste-to-energy facilities such as Petitioner RWS.

In more recent years the State has assumed considerable financial and technical responsibility for landfill remediation and closure. 38 M.R.S.A. §§ 1310-C to 1310-H (1983 & Supp. 1993). Additional responsibilities have been assumed by the Maine Waste Management Agency, created in 1989. Pet.

at 9, n. 7. It is notable that this Agency also has been granted the power to "[d]irect solid wastes from one public or private waste facility to another facility when an emergency is determined to exist by rule or by the Governor." 38 M.R.S.A. § 2103(1)(K) (Supp. 1993). This power has not been used.

As this review of State policy over the last quarter century demonstrates, State government in Maine has been continuously involved in local management of locally generated waste. This involvement has led to a policy of encouraging regional solutions to the waste problem, including waste-to-energy facilities. Local ordinances controlling the flow of locally generated waste are an essential element of this policy. Thus, the State has a strong interest in preserving the constitutionality of such ordinances.

B. This Court's Decision In *C & A Carbone v. Town of Clarkstown* May Not Resolve The Issue Presented Here And Thus May Create Uncertainty For Future Municipal And State Management Of Municipal Solid Waste.

It is likely that the Court's decision in *C & A Carbone v. Town of Clarkstown* will not reach the issue presented here. At oral argument on December 7, 1993, counsel for Petitioner *Carbone* clearly conceded that *Carbone's* challenge to the *Clarkstown* ordinance was only with respect to waste generated out-of-state, and not with respect to local waste. Unless the Court reaches out to decide the local waste issue, *Clarkstown* will not provide any guidance for the many communities in Maine, like the town of Gray, that have flow control ordinances governing local waste. Each such town may be subject to litigation challenging its ordinance as in violation of the Commerce Clause.

Litigation is always costly, but challenges under the Commerce Clause now present the additional risk of incurring damages and the challenger's attorney fees under 42 U.S.C.A. §§ 1983 and 1988 (1981 and Supp. 1993). See *Dennis v. Higgins*, 498 U.S. 439 (1991). Local governments are unlikely to be willing and able to marshall the resources necessary to engage in such potentially protracted and expensive litigation.

The uncertainties involved are further compounded by the fact that it is unclear under the current state of federal case law what is sufficient to meet the test required by the decision below. See Pet. 25-26.

This Court has appropriately struck down under the Commerce Clause a range of state and local attempts to keep out-of-state waste from entering into those state and

local jurisdictions. *Chemical Waste Management, Inc. v. Alabama*, 504 U.S. ___, 112 S.Ct. 2009 (1992); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Department of Natural Resources*, 504 U.S. ____, 112 S.Ct. 2019 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). This is the first case to address a waste designation law involving solely waste generated within the governmental unit enacting the law. The standard imposed by the Court below on the Petitioners is erroneous. This error will impact not only Petitioners, but also other Maine municipalities as well as future state and local waste management policies. In addition, if uncorrected, the error carries broader implications for waste management policy in other states. This Court should grant the petition for writ

of *certiorari* in order to correct this error.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

February 11, 1994 Respectfully submitted,

MICHAEL E. CARPENTER
Attorney General

LUCINDA E. WHITE
Assistant Attorney General
(Counsel of Record)
Department of Attorney General
Environmental Protection Unit
State House Station 6
Augusta, Maine 04333
(207) 626-8800

CABANNE HOWARD
Assistant Attorney General
Of Counsel